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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/645,248	08/20/2003	Mark Timothy Bennett	102792-158	7552

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EXAMINER	
NGUYEN, TRI V	

ART UNIT	PAPER NUMBER
1796	

MAIL DATE	DELIVERY MODE
03/05/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/645,248	BENNETT ET AL.	
	Examiner	Art Unit	
	TRI V. NGUYEN	1796	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *12 November 2008*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-26* is/are pending in the application.

4a) Of the above claim(s) *9-12* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☐ Claim(s) _____ is/are rejected.

7)☒ Claim(s) *1-8 and 13-26* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Request for Continued Examination

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/12/08 has been entered.

Response to Amendment

2. Upon the amendment filed on 11/18/08, Claims 1 and 25 are amended; Claims 9-12 are withdrawn and Claim 26 is added. The currently pending claims are Claims 1-26.
Applicants' remarks (dual antimicrobial system) and amendments have been carefully considered; however, they are not persuasive - see response to arguments section for details. Also new grounds of rejections have been presented.

Claim Rejections - 35 USC § 102 & 103

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

4. Claims 1-8 and 13-26 are rejected under 35 U.S.C. 102(e) as anticipated by Zhou et al.

Zhou et al. teach an antimicrobial hard surface cleaner. See col.3, ln.8. Regarding the claimed hard surface treatment composition comprising: an alcohol constituent selected from the group consisting of methanol, ethanol, n- propanol, isopropanol, n-butanol, benzyl alcohol, and mixtures thereof which is present in an amount of from about 40 and 70 weight percent;

Zhou et al. teach in col.6, that the alkanol can be selected from methanol, ethanol, n-propanol, "isopropanol," the various positional isomers of butanol, pentanol, and hexanol, and mixtures of the foregoing. It may also be possible to utilize in addition to, or in place of, said alkanols, the diols such as methylene, ethylene, propylene and butylene glycols, and mixtures thereof, and including polyalkylene glycols. Zhou et al. motivate one of ordinary skill to preferentially utilize ethanol, which advantageously acts as both a solvent, to maintain the ingredients in the liquid composition in dispersion, as well as a disinfectant. If mixtures of solvents are used, the amounts and ratios of such solvents used are important to determine the optimum performances of the inventive composition. It is preferred to have the total amount of solvent to at least 20%, more preferably least 30%, and most preferably, at least 50%, of the composition. A preferred range is about 20-99.9%. These amounts of solvents are generally referred to as dispersion effective or solubilizing effective amounts, since the other components, such as surfactants, are materials which are assisted into solution by the solvents. As in the case of ethanol, the solvent can also have disinfectancy capacity itself. Finally, the solvent is also important as a cleaning materials itself, helping to loosen and solubilize certain soils for easy removal from the surface treated. See col.6,ln.15-40.

Regarding the claimed pH adjusting agent such that the pH range of the composition is from about 7.0 to about 13.0; Zhou et al. teach in col.9, the utility of pH buffering agents to maintain a constant pH (which for the invention is between about 5- 14, more preferably between about 8-13; formulations containing the tri-potassium and/or tri-ammonium salts will naturally be at a lower end of the range as compared to the corresponding tetra salts). These buffers include, for example, NaOH, KOH, Na.sub.2 CO.sub.3, and K.sub.2 CO.sub.3 as alkaline buffers, and phosphoric, hydrochloric, sulfuric, and citric acids as acidic buffers. See col.9,ln.10-20.

Regarding the optional, one or more constituents selected from the group consisting of antimicrobials, corrosion inhibitors, perfumes, perfume carriers, deodorants, organic solvents, surfactants, propellants, pH buffers, organic acids, fungicides, film-forming polymers, and anti-oxidants; and water, to 100 weight percent, Zhou et al. teach the aerosol formulation comprises an antimicrobial composition that is mixed with a propellant. The composition has the following ingredients: (a) an anionic polymer or prepolymer; (b) a quaternary ammonium compound, the components (a) and (b) combining to form an antimicrobially effective complex; (c) at least one water-soluble or dispersible organic solvent having a vapor pressure of at least 0.001 mm Hg at 25.degree. C., said at least one organic solvent present in a solubilizing--or dispersion--effective amount; (d) an effective amount of a propellant; and (e) the remainder, water. See abstract and col.1 ,ln.60-col.2,ln.5.

Regarding the claimed antimicrobial efficacy against one or more of: Pseudomonas aeruginosa, Entercoccus hirae, Aspergillus niger, T. mentagrophytes. Hepatitis A, Poliovirus Type 1, Coxsachievirus, Rotavirus, or Rhinovirus; Zhou et al. illustrate by example in col.11-12, the prior art composition comprising Buffer (NaOH) 0.007 Dispersing/emulsifying/wetting agent.sup.1 0.03 Fragrance.sup.2 0.25 Corrosion Inhibitor.sup.3 0.6 Quaternary Ammonium Compound.sup.4 0.63 Anionic Polymer.sup.5 1.05 Propellant.sup.6 10 Water 122.433 Ethanol 65 Total % by weight =100 resulting in complete inactivation of each of the viruses in table II, and each of the fungi in table III (which encompass the claimed virucidal activity to Poliovirus Type 1 and antifungal activity to Aspergillus niger, and T. mentagrophytes).

It is noted that, according to MPEP 2173.05(i), the "mere absence of a positive recitation is not basis for an exclusion" - thus, the presence of anionic component is not precluded in the instant claims. Furthermore, it is noted that the dual component is not precluded in the instant claims.

5. Claims 1-8 and 13-26 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Kitzke et al. (US 3282776).

Kitzke et al. teach a composition that includes (a) at least 10% of water; (b) a propellant; (c) 60 to 65% of ethanol; (d) a quarternary ammonium germicide compound; (d) a surfactant and additives (col 2, lines 38-48; col. 3, lines 4-13; col 5, line 74 to col 6, line 39; col 7, lines 8-65; col 9, lines 19-42 and examples & tables starting on col 12, line 59). Furthermore, Kizke et al. teach the pH in the range of about 9 to about 11 (col 7, lines 69-71).

Accordingly, the reference anticipates the material limitations of the listed claims.

Regarding the various claimed properties, Kitzke et al. do not explicitly teach the efficacy against the claimed microbes; however, it is noted that the court has held that that a material and its properties are inseparable (*In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990)) and that compositions are indefinite for being defined in terms of properties. Ex parte Spacht, 165 USPQ 409 (PO BdPatApp 1969); Ex parte Slob,, 157 USPQ 172 (PO BdPatApp 1967); Ex parte Pulvari, 157 USPQ (PO BdPatApp 1966). Thus it would be expected that similar compositions with similar ingredients would exhibit similar chemical behaviors - in the instant case, the same efficacy against the claimed microbes. Also, it is noted that the reference teaches each of the claimed ingredients within the claimed proportions and such modifications are recognized as being well within the purview of the skilled artisan to yield predictable results.

Response to Arguments

6. Applicant's arguments filed 11/18/08 have been fully considered but they are not persuasive.

Applicants argue that the Zhou et al. reference teach ingredients that are not present in the instant claim - anionic pre-polymer or polymer (page 7 et seq.). The examiner respectfully notes that the "comprising" language leaves the claim open for the inclusion of unspecified ingredients even in major amounts, see *Ex parte Davis et al.,* 80 *USPQ* 448 (PTO Ed. App. 1948). Also, the broad "comprising" and "containing" terminology do not exclude the presence of other ingredients in the composition, unlike the narrow "consisting of" language, see *Swain v.Crittendon, 332 F* 2d 820,14 1 USPQ 8 11 (CCPA 1964). The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., > Mars Inc. v. H.J. Heinz Co., 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). Invitrogen Corp. v. Biocrest Mfg., L.P., 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003). Genentech, Inc. v. Chiron Corp., 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim).

Furthermore, It is noted that, according to MPEP 2173.05(i), the "mere absence of a positive recitation is not basis for an exclusion" - thus, the presence of anionic component is not precluded in the instant claims.

Regarding claim 25, though the "consisting of" language is restrictive of the claimed components, it is noted that the presence of optional components such as an antimicrobial agent is construed as an open-ended parameters that would allow for the anionic pre-polymer to be present as an antimicrobial agent.

Conclusion

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

a. Colurciello et al. (US 6376448) teach a hard surface cleaning with antimicrobial agent and ethanol.

b. Tuominen et al. (US 4695453) teach a thickened alcoholic antibacterial composition.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to TRI V. NGUYEN whose telephone number is (571)272-6965. The examiner can normally be reached on M-F 8:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vasu Jagannathan can be reached on (571) 272-1119. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/T. V. N./
Examiner, Art Unit 1796
March 5, 2009

/Lorna M Douyon/
Primary Examiner, Art Unit 1796